Supreme Court, U.S.
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No. 98-1756

In The

Supreme Court of the United States

WAYNE EVANS and MADELYN EVANS,
husband and wife,

Petitioners,

v.

TOHONO O'ODHAM NATION; WILLIE GILBERT; DAWSON RILEY and DAVINA RILEY; HAROLD MARCONDA; LINDA MARTIN and JACK MARTIN; JEREMY EVANS; DANIEL EVANS; HUNTINGTON CONSTRUCTION, INC.; WESTERN PACIFIC CONSTRUCTION, INC.; and VOICE OF GOD RECORDINGS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT TOHONO O'ODHAM NATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REVISED STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Respondent suggests that a more accurate statement of the Questions Presented is as follows:

1. Whether the court below, like all other courts which have decided the issue, properly concluded that the federal common law privilege against adverse spousal testimony (also referred to as the anti-marital fact privilege) applies only in criminal proceedings where life or liberty is at stake.

2. Whether the court below correctly concluded that in a federal question jurisdiction case, as opposed to diversity jurisdiction case, federal common law governs the application of privilege law.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. The Material Facts 1

B. The Proceedings and Decisions Below 3

REASONS FOR DENYING THE WRIT 5

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SCOPE OF THE PRIVILEGE AGAINST ADVERSE SPOUSAL TESTIMONY HAS BEEN SETTLED BY THIS COURT AS WELL AS CIRCUIT APPELLATE COURTS 5

A. The Privilege Against Adverse Spousal Testimony Does Not Apply In Federal Civil Cases 5

B. Even In Criminal Cases, The Privilege Against Adverse Spousal Testimony Does Not Insulate A Spouse From Giving Testimony Because The Privilege Is Unavailable Unless The Anticipated Testimony Is In Fact Adverse To The Non-Witness Spouse 13

II. EVIDENCE RULE 501 MANDATES THE APPLICATION OF THE FEDERAL COMMON LAW OF PRIVILEGES WHERE, AS HERE, JURISDICTION IS BASED ON FEDERAL QUESTION 15

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES:

Abbott v. Kidder, Peabody & Co., 1997 WL 337228 (N.D. Ill. 1997) 11

Branzburg v. Hayes, 408 U.S. 665 (1972) 17

Brunt v. Hunterdon County, 183 F.R.D. 181 (D.N.J. 1998) 16

Engelmann v. Nat'l Broadcasting Co., 1995 WL 214500 (S.D.N.Y. 1995) 11

Flexmaster Aluminum Awning v. Hirschberg, 173 Ariz. 83, 839 P.2d 1128 (Ct. App. 1992) 3

Funk v. United States, 290 U.S. 371 (1933) 6, 7, 8

Hancock v. Dobson, 958 F.2d 1367 (6th Cir. 1992) 15

Hancock v. Hobbs, 967 F.2d 462 (11th Cir. 1992) 16

Hawkins v. United States, 358 U.S. 74 (1958) 7, 8, 9, 10, 12

In re Grand Jury Matter, 673 F.2d 688 (3rd Cir.), *cert. denied*, 459 U.S. 1015 (1982) 12

In re Grand Jury (Malfitano), 633 F.2d 276 (3d Cir. 1980) 14

In re Grand Jury Proceedings, 664 F.2d 423 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982) 14

In re Martenson, 779 F.2d 461 (8th Cir. 1985) 14

In re Shur, 225 B.R. 295 (E.D.N.Y. 1998) 11

Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455 (N.D. Cal. 1978) 16

TABLE OF AUTHORITIES – Continued

Page

Ryan v. Commissioner of Internal Revenue, 568 F.2d 531 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978) 9, 10

Securities and Exch. Comm'n v. Lavin, 111 F.3d 921 (D.C. Cir. 1997) 11

Smith v. Alice Peck Day Memorial Hosp., 148 F.R.D. 51 (D.N.H. 1993) 18

Spencer Sav. Bank v. Excell Mortgage Corp., 960 F.Supp. 835 (D.N.J. 1997) 16

Stein v. Bowman, 38 U.S. 209 (1839) 6, 7

Trammel v. United States, 445 U.S. 40 (1980) ..... *passim*

United States v. Cauwenberghe, 827 F.2d 424 (9th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988) 13, 14

United States v. Nixon, 418 U.S. 683 (1973) 6, 17

United States v. Premises Known as 281 Soysset Woodbury Rd., 71 F.3d 1067 (2d Cir. 1995) 11

United States v. State of Illinois, 148 F.R.D. 587 (N.D. Ill. 1993) 16

United States v. Van Drunen, 501 F.2d 1393 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974) 12

University of Pennsylvania v. Equal Employment Opportunity Comm'n, 493 U.S. 182 (1990) 6, 17

Wm. T. Thompson Co. v. Gen. Nutrition Corp., 671 F.2d 100 (3d Cir. 1982) 16, 17

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES:

18 U.S.C. § 1964 3

28 U.S.C. § 1331 3

Ariz. Rev. Stat. Ann. § 25-211 2

Fed. R. Evid. 501 ..... 5, 10, 15, 18

OTHER AUTHORITIES:

CHARLES A WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE, EVIDENCE § 5434 at 862 (1980) 17

JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 501.02[3][b] (Matthew Bender 2d ed. 1997) 16

STATEMENT OF THE CASE

A. The Material Facts.

Respondent, the Tohono O'odham Nation (the "Nation"), is a federally recognized Indian tribe, which by legislative resolution established a Farming Authority (the "Farming Authority") to, among other things, commercially manage the Nation's agricultural resources, and generate profits from such operations for the Nation's benefit and related purposes. In December 1994, the Farming Authority hired Petitioner Wayne Evans ("Evans") to serve as its interim general manager. He later entered into written contract with the Farming Authority to serve as its general manager.

The complaint alleges that Evans, while serving as the general manager for the Farming Authority, engaged in a fraudulent scheme to misappropriate money from the Farming Authority that involved multiple forgeries, counterfeit invoices, the use of U.S. and private mail, and the use of interstate telephone communications. Using a forged contract, Evans engaged Huntington Construction, Inc. ("Huntington"), a company in which he had an interest and which, for all intents and purposes, he controlled to perform work for the Farming Authority. After hiding and lying about his interest in Huntington, Evans caused the Farming Authority to pay Huntington nearly $1.6 million for work that cost Huntington less than $300,000, thereby giving Huntington an unearned profit of approximately $1.3 million. Evans also gave Farming Authority money to Western Pacific Construction, Inc. ("Western Pacific"), another company in which Evans had an interest, for work and services that Western Pacific could not

have performed. Once in the hands of Huntington, the Farming Authority's money was then distributed at the direction of Evans directly to himself (or for his benefit), to his family members, to Western Pacific, to the Church of the Word of God, to Voice of God Recordings, Inc. ("Voice of God") and to others who performed no services for the Farming Authority. Evans caused $820,000 of the monies received by Huntington from the Farming Authority to be sent to Voice of God in Jeffersonville, Indiana. The Farming Authority learned of the $820,000 transfer to Voice of God, several days after it was made. Thereafter, Evans was terminated from his position with the Farming Authority.

Based on these facts, the Nation asserted: (1) federal and state RICO claims against Evans and Huntington (and others); (2) an unjust enrichment claim against Huntington and Western Pacific; (3) a conversion claim against Huntington, Evans, Western Pacific (and others); (4) a constructive trust claim against Huntington, Western Pacific, Evans (and others); (5) a breach of contract claim against Evans; and (6) a breach of fiduciary duty claim against Evans. Contrary to Petitioners' assertions in their statement of the case, the Nation has not asserted any claims directly against Madelyn Evans.

Under Arizona law, it is necessary to name the spouse of a party who has engaged in wrongdoing in order to obtain a judgment enforceable against their jointly owned community property. In Arizona, all property acquired during marriage (with certain exceptions not pertinent here) is presumptively community property, in which both spouses have an interest. *See* Ariz. Rev. Stat. Ann. § 25-211 (1973). Madelyn Evans was thus

named as a party because she is a necessary and proper party in a suit to "obtain and execute a judgment against community" property under Arizona law. *Flexmaster Aluminum Awning v. Hirschberg*, 173 Ariz. 83, 88, 839 P.2d 1128, 1123 (Ct. App. 1992). The Nation has not alleged that Madelyn Evans has done anything that would make her individually liable to the Nation.

B. The Proceedings and Decisions Below.

In September 1997, the Nation filed suit against defendants in the United States District Court in Tucson, Arizona. Several months later, the Nation amended its complaint to add additional parties and assert additional claims. The essence of the Nation's amended complaint is summarized in the preceding section. Federal court jurisdiction is based on federal question jurisdiction under 28 U.S.C. § 1331 and 18 U.S.C. § 1964.

The Nation noticed the depositions of defendants Wayne and Madelyn Evans. A few days before the depositions were scheduled, the Evanses moved for a protective order to excuse them from giving depositions on the grounds that they intended: (1) to assert their fifth amendment privilege against self incrimination as to every question asked of them after a request for their names; and (2) to assert the privilege against adverse spousal testimony (also referred to as the anti-marital fact privilege). In its opposition papers, the Nation pointed out that defendants cannot make a blanket assertion of their fifth amendment privilege, and that, under prevailing federal law, the privilege against adverse spousal testimony is not recognized in a federal civil case. At oral

argument on the Evanses' motion, the Nation also brought to the district court's attention cases holding that, like the fifth amendment privilege, the adverse testimony privilege does not create a blanket privilege. Rather, the privilege may only be asserted on a question-by-question basis.

The district court denied the Evanses' motion. The district court found that the federal common law on privileges governs "when jurisdiction is based on a federal question, as opposed to diversity." (Petitioners' App. B, p. 6a) The district court further concluded that the privilege against adverse spousal testimony "applies only to adverse testimony, and does not create a blanket privilege." (Petitioners' App. B, p. 6a) Finally, the district court held that, under prevailing federal law, there is no privilege against adverse spousal testimony "in a federal civil case." (Petitioners' App. B, p. 7a)

The Evanses filed a petition for writ of mandamus with the Ninth Circuit Court of Appeals, contending that the district court improperly denied their motion for a protective order because the court failed to recognize the privilege against adverse spousal testimony in a federal civil case. Thereafter, the district court granted the Evanses a stay of their depositions pending the Ninth Circuit's ruling on their petition for writ of mandamus. (Petitioners' App. C, p. 8a) A few weeks later, the Ninth Circuit concluded that the Evanses had "not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus" and denied the petition. (Petitioners' App. A, p. 1a)

By order dated April 9, 1999, the district court continued the stay of the depositions for 60 days to allow the Evanses to pursue a petition for writ of certiorari with this Court. (Petitioners' App. C, p. 11a)

REASONS FOR DENYING THE WRIT

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SCOPE OF THE PRIVILEGE AGAINST ADVERSE SPOUSAL TESTIMONY HAS BEEN SETTLED BY THIS COURT AS WELL AS CIRCUIT APPELLATE COURTS.

A. The Privilege Against Adverse Spousal Testimony Does Not Apply In Federal Civil Cases.

The Evanses claim that the district court erred by failing to accept their assertion of the privilege against adverse spousal testimony in this civil case. The privilege has never been recognized in a federal civil case and, given this Court's policy that privileges should be narrowly construed because they block the judicial fact-finding function, there is no justifiable reason to expand the privilege.

Testimonial privileges of a witness are "governed by the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience." Fed. R. Evid. 501. In enacting Rule 501, "Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis. . . .' " *Trammel v. United*

States, 445 U.S. 40, 47 (1980) (quoting 120 Cong. Rec. 40,891 (1974)). When deciding privilege issues, this Court has recognized that privileges must be narrowly construed because they interfere with the search for the truth. *United States v. Nixon*, 418 U.S. 683, 710 (1973) (Privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth."). As a result, this "Court has been disinclined to exercise [its] authority expansively" to interpret privileges. *University of Pennsylvania v. Equal Employment Opportunity Comm'n*, 493 U.S. 182, 189 (1990).

Relying on *Stein v. Bowman*, 38 U.S. 209 (1839), the Evanses contend (Petition at 9) that there has been a long-established rule recognizing the privilege against adverse spousal testimony in a federal civil case. *Stein* did not specifically address the privilege issue. Rather, in that case, the Court addressed the rule of spousal disqualification, which provided "that neither husband nor wife can be a witness *for or against the other*." *Id.* at 222 (emphasis added). The rule of law applicable at the time also prevented a party from being "a witness in his own case" because of the perceived strong temptation to give perjured testimony. *Id.* at 219.

Moreover, the rule stated in *Stein* was limited in *Funk v. United States*, 290 U.S. 371, 376 (1933). There, this Court explained that the basic rule in *Stein* preventing a spouse from giving testimony for or against her spouse had been modified "partially by legislation and partially by judicial construction." This Court noted that Congress had subsequently enacted legislation "that no witness should be excluded from testifying in any civil action, with certain exceptions, because he was a party to or interested in the issue tried." *Id.* at 377. The exclusion of a spouse from

giving testimony for or against his or her spouse "was based upon his or her interest in the event." *Id.* at 380. In short, *Funk* abolished the spousal testimonial disqualification in federal courts to permit a spouse of a defendant to testify on his behalf, reasoning that the beliefs "to admit such testimony is against public policy because it would endanger the harmony and confidence of the marital relations, and, moreover, would subject the witness to the temptation to commit perjury" had been rejected. *Id.* at 381. *Funk* did not actually confront the privilege against adverse spousal testimony.

There does not appear to be any reported federal court case which has applied the privilege against adverse spousal testimony in a civil case. The privilege has been applied only in criminal cases, which have accorded great significance to the connection between the criminal aspect of the case and the spousal testimony. In *Hawkins v. United States*, 358 U.S. 74 (1958), in deciding that the non-witness spouse held the privilege, this Court explained that the rule of law regarding adverse spousal testimony has "refused to pit wife against husband or husband against wife in *a trial where life or liberty is at stake* . . . ," thereby limiting application of the privilege to a criminal proceeding. *Id.* at 77 (emphasis added). In his concurring opinion, Justice Stewart echoed the limited application of this privilege to criminal cases when he explained that "it has now become simply a privilege of the *criminal defendant* to prevent his spouse from testifying against him." *Id.* at 81 (emphasis added).[1]

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[1] The *Hawkins* case also explained that the "rule stated in *Stein v. Bowman* was followed by this and other federal courts

Several years after the *Hawkins* decision, the privilege against adverse spousal testimony was criticized by this Court in *Trammel*, a criminal case, where the Court quoted Professor Wigmore's statement that the privilege is the " 'merest anachronism in legal theory and an indefensible obstruction to truth in practice.' " 445 U.S. at 45. Noting that "[n]o other testimonial privilege sweeps so broadly" this Court explained that "[t]he ancient foundations for so sweeping a privilege have long since disappeared." *Id.* at 51, 52. Rather than abolish the privilege entirely, however, the Court limited its holding to the issue before it – the right of one spouse to use the privilege to prevent testimony by the willing spouse. The Court modified the privilege, holding that only the witness spouse, not the non-witness spouse, could invoke the privilege against adverse spousal testimony. *Id.* at 53 ("[W]e conclude that the existing rule should be modified so that the witness-spouse alone has the privilege to refuse to testify adversely; the witness may neither be compelled to testify nor foreclosed from testifying.").

Although the issue presented here is slightly different, the discussion and analysis in *Trammel* illustrates that the privilege against adverse spousal testimony *is limited to criminal cases and has no bearing in civil cases*. For example, the Court framed the issue before it as follows: "whether the privilege against adverse spousal testimony promotes sufficiently important interests to outweigh the

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until 1933 when this Court decided *Funk v. United States*" and that the *Funk* case left open the question "which allowed either spouse to exclude adverse testimony by the other." 358 U.S. at 76.

need for probative evidence in the administration of *criminal justice." Id.* at 51 (emphasis added). This Court further explained that unlike the marital communications privilege which protects private communications, the spousal privilege seeks to "exclude evidence of *criminal acts* and of communications made in the presence of third persons" in order to preserve marital harmony. *Id.* at 51 (emphasis added). The *Trammel* opinion also refers to the privilege against adverse spousal testimony as applying to *"an accused." Id.* at 48, 49, 51, 52 (emphasis added). Finally, the opinion notes that the "modification – vesting the privilege in the witness-spouse – furthers the important public interest in marital harmony without unduly burdening legitimate *law enforcement needs." Id.* at 53 (emphasis added).

All Circuit Courts of Appeal and District Courts that have addressed the issue since the decisions in *Hawkins* and *Trammel* have limited the privilege against adverse spousal testimony to criminal cases. Recognition of the marital privilege only in criminal cases was found to be the rule in the Seventh Circuit in *Ryan v. Commissioner of Internal Revenue*, 568 F.2d 531 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978). Relying on *Hawkins*, the court affirmed a decision of the Tax Court holding in contempt of court a taxpayer husband and wife who, on the grounds of the martial privilege, refused to answer interrogatories propounded by the Commissioner of the IRS. The court concluded that the privilege had been recognized only in criminal cases and that the Supreme Court had preserved the privilege in trials where life or liberty was at stake. Moreover, the court relied on "Proposed Rule of Evidence 505, which was adopted by the Supreme

Court but rejected by Congress" as providing guidance in interpreting the privilege because the Proposed Rule "would have restricted the privilege to criminal cases." 531 F.2d at 543.[2] The court in that case also concluded that "no independent policy reasons" would justify extending the privilege in that case. 531 F.2d at 544.[3]

The Second Circuit also has refused to extend the privilege, observing that the "adverse spousal testimony privilege has traditionally been limited to criminal cases."

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[2] Limiting the privilege against adverse spousal testimony to criminal cases is consistent with the Supreme Court's proposed rule of evidence regarding husband-wife privileges. Proposed Federal Rule of Evidence 505 "would have codified the Hawkins rule" [*Trammel*, 445 U.S. at 47] and would have restricted the privilege to criminal proceedings [*see* Proposed Rule 505(a) ("An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.")]. Although this rule was not adopted, it provides guidance for interpreting the scope of the privilege against adverse spousal testimony. According to the Advisory Committee Notes accompanying Rule 501, "the action of Congress should not be understood as disapproving any recognition . . . of the enumerated privileges contained in the Supreme Court rules."

[3] Petitioners contend that the *Ryan* case should be disregarded because it "preceded *Hawkins*, and in *Hawkins* this Court rejected most of the policy arguments *Ryan* rested upon." (Petition at 14) That simply is not true because *Hawkins* was decided in 1958 and *Ryan* was decided in 1977. In fact, *Ryan* based its decision upon *Hawkins*. Petitioners also attack the *Ryan* decision because of a statement in the case that the fifth amendment "applies only to criminal cases." A thorough reading of the case reveals that the gist of that statement was that the privilege against self-incrimination extends to instances where the witness has reasonable cause to fear prosecution from answering certain questions.

United States v. Premises Known as 281 Soysset Woodbury Rd., 71 F.3d 1067 (2d Cir. 1995). That case involved a civil forfeiture proceeding that arose out of a drug trafficking conviction. The court rejected the argument that the privilege should apply in a civil forfeiture dispute because forfeiture is quasi-criminal. *Id.* at 1070. The Petitioners here criticize this case, contending that its holding is based upon secondary sources that cite no authoritative case law for the criminal/civil dichotomy regarding the privilege against adverse spousal testimony. They misread this case because the decision, in large part, followed *Trammel* and its reasoning.

The Court of Appeals for the District of Columbia has also noted that the privilege is limited to criminal cases. *Securities and Exch. Comm'n v. Lavin*, 111 F.3d 921, 925 (D.C. Cir. 1997) (The privilege against adverse spousal testimony "allows a spouse called as a witness against his or her spouse in a criminal proceeding to refuse to testify.") (citing *Trammel*, 445 U.S. at 53). District courts have consistently adhered to the same rule. *See In re Shur*, 225 B.R. 295, 300 (E.D.N.Y. 1998) ("The anti-marital facts privilege is limited to criminal matters 'where one spouse is a party and the other spouse is called to testify.' "); *Abbott v. Kidder, Peabody & Co.*, 1997 WL 337228, *4 (N.D. Ill. 1997) ("The federal common law marital privilege against adverse spousal testimony applies only in criminal cases."); *Engelmann v. Nat'l Broadcasting Co.*, 1995 WL 214500, *2 (S.D.N.Y. 1995) ("[T]he privilege against adverse spousal testimony is only applicable in criminal actions and hence has no bearing in this civil action."). In federal criminal cases where the privilege has been applied, courts have cautiously stated that the privilege is

limited to criminal cases. *See, e.g., In re Grand Jury Matter,* 673 F.2d 688, 691-92 (3d Cir.) ("We have concluded that in Trammel the Supreme Court had 'decided that the privilege against adverse spousal testimony remains a viable principle of federal law and only modified the privilege by vesting it solely in the testifying spouse.' As we then noted, 'The crux of the privilege is that a person may not be forced to be a witness against his or her spouse in a criminal proceeding.' ") (citations omitted), *cert. denied,* 459 U.S. 1015 (1982); *United States v. Van Drunen,* 501 F.2d 1393, 1396 (7th Cir.) (explaining that the privilege against adverse spousal testimony may excuse a spouse from testifying against her spouse "in a criminal case"), *cert. denied,* 419 U.S. 1091 (1974).[4]

The decisions by the federal courts below are unanimous. The Petitioners stand alone in their position that the privilege against adverse spousal testimony applies in a federal civil case. Under their suggested approach, both spouses would be able to escape testifying in a civil case where one spouse is party because state community property law requires that both be named in the suit. The primary wrongdoer – here Evans – would be able to escape giving deposition testimony. Such a result would run afoul of controlling Supreme Court law and the search for truth in the quest to administer justice. *See Trammel,* 445 U.S. at 50-51 ("Testimonial exclusionary rules and privileges contravene the fundamental principle that

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[4] Petitioners have criticized the district court decisions that have concluded that the privilege applies only in criminal cases as having no real authoritative support. These decisions find support in and are consistent with *Hawkins* and *Trammel.*

'the public . . . has a right to every man's evidence.' As such, they must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good of transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.") (citations omitted).

B. Even In Criminal Cases, The Privilege Against Adverse Spousal Testimony Does Not Insulate A Spouse From Giving Testimony Because The Privilege Is Unavailable Unless The Anticipated Testimony Is In Fact Adverse To The Non-Witness Spouse.

Petitioners suggest that the privilege against adverse spousal testimony ought to completely insulate them from giving *any* testimony. This argument, that the spousal testimony privilege protects the very act of testifying, overlooks the significance of adversity in determining the scope of the privilege. Neither *Trammel*, nor the Circuit Appellate Courts that have addressed the adverse spousal testimony privilege, have suggested that the privilege is so broad as to protect any testimony at all by a spouse. As stated in *Trammel*, the rule applies only to testimony that is adverse to the spouse's penal interests. *Id.* at 53 (explaining that the rule gives the witness-spouse "a privilege to refuse to testify adversely"). *Trammel* did not create a blanket privilege from giving any testimony.

Moreover, Circuit Appellate Courts have consistently recognized that the privilege only applies to testimony that is adverse to the other spouse's penal interest. *See, e.g., United States v. Cauwenberghe*, 827 F.2d 424, 431 (9th

Cir. 1987) (refusing to recognize the spousal privilege where the witness failed to demonstrate that the testimony was adverse to her spouse's penal interests), *cert. denied*, 484 U.S. 1042 (1988); *In re Martenson*, 779 F.2d 461, 464 (8th Cir. 1985) (holding that the privilege is "not available unless the anticipated testimony would in fact be adverse to the non-witness spouse."); *In re Grand Jury Proceedings*, 664 F.2d 423, 429-430 (5th Cir. 1981) (similar), *cert. denied*, 455 U.S. 1000 (1982). In *In re Grand Jury (Malfitano)*, 633 F.2d 276, 280 n.6 (3d Cir. 1980), the court acknowledged that "the [spousal testimony] privilege is not absolute: it does not shield all testimony nor does it bar procedures that may protect the spouse from the effects of the testimony."

A prerequisite to raising the privilege requires that the testimony be adverse. It must be offered against a spouse who is a party in the case and bear harmfully on that spouse's penal interests. Courts have not applied the privilege to prevent testimony on objective facts having no effect on the party spouse. Consequently, even in criminal cases, blanket assertions of the privilege are not permitted because the privilege is not a general one. As with asserting the fifth amendment privilege against self-incrimination, the privilege against adverse spousal testimony "must be asserted as to particular questions" and, consistent with the district court's holding in this case, cannot be made as a blanket assertion against giving any testimony at all. *Cauwenberghe*, 827 F.2d at 431.

II. EVIDENCE RULE 501 MANDATES THE APPLICATION OF THE FEDERAL COMMON LAW OF PRIVILEGES WHERE, AS HERE, JURISDICTION IS BASED ON FEDERAL QUESTION.

Petitioners urge that review is also necessary to establish that state privilege law applies in cases where state law claims are raised along with federal question claims. Federal Rule of Evidence 501 and cases following it have uniformly rejected this notion, making review unnecessary here.

Rule 501 of the Federal Rules of Evidence provides in pertinent part that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness . . . shall be determined in accordance with State law." The Advisory Committee Notes explain that "state privilege law will generally apply in diversity cases" and, conversely, "[i]n nondiversity jurisdiction civil cases, federal privilege law will generally apply."

Courts have invariably found that in cases such as this, involving federal question jurisdiction and pendent state law claims, the federal law of privileges applies. *See Hancock v. Dobson*, 958 F.2d 1367, 1373 (6th Cir. 1992) ("Since the instant case is a federal question case by virtue of the appellant's section 1983 claim, we hold that the existence of pendent state law claims does not relieve

us of our obligation to apply the federal law of privilege."); *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 671 F.2d 100, 103 (3d Cir. 1982) ("[I]n federal question cases the federal common law of privileges applies."); *United States v. State of Illinois*, 148 F.R.D. 587, 588, 590 (N.D. Ill. 1993) ("[A] state law privilege is limited in a case in federal court governed by substantive federal law"; "It is therefore the Federal Common Law of privilege that is supreme."); *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455, 459 (N.D. Cal. 1978) ("[I]n federal question cases where pendent state claims are raised the federal common law of privileges should govern all claims of privilege raised in the litigation."). Other recent cases addressing the issue have likewise held that the federal law of privilege controls in federal question jurisdiction cases "even if the witness-testimony is relevant to a pendent state law count which may be controlled by a contrary state law privilege." *Hancock v. Hobbs*, 967 F.2d 462, 467 (11th Cir. 1992) (per curiam); *accord Spencer Sav. Bank v. Excell Mortgage Corp.*, 960 F.Supp. 835, 836 (D.N.J. 1997) ("[T]he federal law of privileges governs" where a "plaintiff has asserted both federal and state law causes of action."); *Brunt v. Hunterdon County*, 183 F.R.D. 181, 185 (D.N.J. 1998) (similar).

Leading commentators on evidence have reached the same conclusion. Weinstein explains that "in federal question cases where pendent state claims are raised the federal common law of privileges should govern all claims of privilege raised in the litigation." 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 501.02[3][b] (Matthew Bender 2d ed. 1997). Wright & Graham also assert that the most

appropriate approach is to conclude that because the provision requiring federal courts to look to state privilege law in certain circumstances is an exception to the general rule that federal privilege law applies in federal court, "courts should always follow the federal rule when the same evidence is relevant to both a state law and federal claim." 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE, EVIDENCE § 5434 at 862 (1980).

There is logic to applying the rule that federal privilege law governs in a federal question case, where pendent state law claims are also asserted, because federal law favors admissibility and disfavors privileges not constitutionally based. *Wm. T. Thompson Co.*, 671 F.2d at 104. Indeed, this Court has cautioned federal courts to create or expand federal privileges only with extreme reluctance. *University of Pennsylvania*, 493 U.S. at 189; *Nixon*, 418 U.S. at 710 n.18. A strict construction of privileges is appropriate in federal question cases because "privileges obstruct the search for truth," *Branzburg v. Hayes*, 408 U.S. 665, 690 n.29 (1972), and "contravene the fundamental principle that the 'public . . . has a right to every [person's] evidence.' " *University of Pennsylvania*, 493 U.S. at 189; *accord Trammel*, 445 U.S. at 50 ("Privileges must be strictly construed and tolerated only to the very limited extent that . . . excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.").

Federal courts may, however, "resort to state law analogies for the development of a federal common law of privileges in instances where the federal rule is unsettled." *Wm. T. Thompson Co.*, 671 F.2d at 104. Federal law

on the privilege against adverse spousal testimony has been settled in the federal courts – a result that makes it unnecessary to look to or adopt Arizona law on the issue.

Nevertheless, Petitioners urge this Court to adopt the approach to consider state law privileges used by the district court in *Smith v. Alice Peck Day Memorial Hosp.*, 148 F.R.D. 51 (D.N.H. 1993). Contrary to Petitioner's argument, *Smith* is entirely consistent with the approach described above. That case involved seven state law claims, three federal claims, and jurisdiction was based on both diversity and federal question. Consistent with Rule 501 and federal cases on choice of law with respect to privileges, the court concluded that "in cases such as this one, where jurisdiction is based on both diversity of citizenship and the presence of federal claims, federal common law controls any claim of privilege." *Id.* at 53. The question before the court was not whether state or federal privilege law applied, but whether "a federal court should recognize a state [quality assurance privilege applicable to hospitals] as a matter of federal common law." *Id.* The court refused to adopt the "quality assurance privilege . . . even if the state courts would apply the privilege in such cases." *Id.* at 56.

In the instant case, there is no reason to stray from settled federal law and apply Arizona law with respect to the privilege against adverse spousal testimony. Nor should Arizona law be substituted for the federal rule governing this privilege in light of unanimous federal law to the contrary.

CONCLUSION

This case does not merit further review by this Court. For the foregoing reasons, the Court should deny the petition for writ of certiorari.

Respectfully Submitted,

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